

Before the
Administrative Hearing Commission
State of Missouri



MISSOURI REAL ESTATE COMMISSION,)	
)	
Petitioner,)	
)	
vs.)	No. 11-1611 RE
)	
PATRICK MCNALLY,)	
)	
Respondents.)	

DECISION

We find cause to discipline the license of Patrick McNally because he used the court system to steal property in violation of state laws.

Procedure

The Missouri Real Estate Commission (“MREC”) filed a complaint seeking to discipline McNally’s license on August 5, 2011, and an amended complaint on February 16, 2012. McNally filed an answer on September 8, 2011, and an amended answer on March 16, 2012. We held a hearing on November 14, 2012. Assistant Attorney General Matthew Laudano represented the MREC. Sherry Mariea represented McNally. This case became ready for our decision on May 2, 2013, the date the last written argument was filed.

Findings of Fact

1. McNally holds a real estate broker license. His license was current and active at all times relevant to this action.

2. One of McNally's clients was Motor Sports Properties LLC (MSP).

The Piatt Affidavit

3. Between 2002 and 2007, McNally tried to purchase four lots in Osage Beach, Missouri, owned by Jeanne Piatt.

4. These lots were Lots 13, 14, 27, and 28 in Block 25, Osage Beach Subdivision, Camden County, Missouri ("the Piatt Properties").

5. McNally sent Piatt a letter on August 2, 2002, stating that he was interested in acquiring the Piatt Properties and asking Piatt to call him. This letter was sent to Piatt at 1975 W. Bay Dr. #509, Largo, Florida 33770.

6. McNally sent Piatt a letter on October 3, 2002, offering to pay \$10,000 for the Piatt Properties. This letter was sent to Piatt at 1975 W. Bay Dr. #509, Largo, Florida 33770.

7. McNally sent Piatt a letter on January 24, 2003, offering to purchase the Piatt Properties for \$3,000 per lot. This letter was sent to Piatt at 1975 W. Bay Dr. #509, Largo, Florida 33770.

8. In 2006, McNally hired a private investigator to determine Piatt's address.

9. On July 11, 2006, the private investigator informed McNally that Piatt's current address was 3335 Stars Cove Lane, Knoxville, Tennessee 37931.

10. On August 3, 2006, McNally sent Piatt a letter stating that his client had an interest in purchasing the Piatt Properties. McNally sent that letter to Piatt at 3335 Stars Cove Lane, Knoxville, Tennessee 37931.

11. In January 2007, McNally called Piatt at her home in Knoxville, Tennessee. McNally spoke to Arlene Brown, Piatt's mother, because Piatt was not at home.

12. On January 26, 2007, McNally e-mailed a request to MSP's attorney, Fay Coultas. In that request, he asked Coultas to file an adverse possession suit against the Piatt Properties.

McNally provided Coultas with an address for Piatt at 1975 W. Bay Dr. #509, Largo, Florida 33770.

13. Coultas filed that action in the Camden County Circuit Court, case no. 07CM-CC00059.

14. As part of that action, and in order to gain service by publication, McNally signed an affidavit stating that Piatt's whereabouts, among others,¹ were unknown. The affidavit was dated February 20, 2007, and filed with the Camden County Circuit Court.

15. McNally swore under oath that the contents of the affidavit were true.

16. McNally knew where Piatt lived at the time he signed the affidavit.

17. The Camden County Circuit Court ordered service by publication.

18. The Camden County Circuit Court issued a default judgment against Piatt.

19. After Piatt entered an appearance and filed a motion to set aside the default judgment, Coultas asked the Court to withdraw the default judgment and dismiss the action with prejudice. The Camden County Circuit Court did so.

20. An MREC investigator interviewed McNally on May 11, 2011. McNally told the investigator that his private investigator was unsuccessful in locating Piatt.

The Thrower Affidavit

21. On September 20, 2002, McNally sent a letter to A.C. Thrower.

22. In that letter, McNally conveyed an offer from MSP to purchase Lots 2 and 3 in Block 31 of the Osage Beach subdivision in Camden County ("the Thrower Properties") for \$3,000 total.

¹ Piatt was a trustee over the properties. The other two named defendants were the potential successor trustees.

23. On January 9, 2003, McNally sent a letter to Thrower. In that letter, McNally conveyed an offer from MSP to purchase Lots 2 and 3 in Block 31 of the Osage Beach subdivision in Camden County for \$4,000 total.

24. On March 17, 2004, McNally sent a letter to Thrower. In that letter, McNally conveyed an offer from MSP to purchase Lots 2 and 3 in Block 31 of the Osage Beach subdivision in Camden County for \$5,000 total.

25. On August 9, 2006, Coultas filed a quiet title action on behalf of MSP against Thrower and Sherry Anderson (“Anderson”), Thrower’s granddaughter, in the Camden County Circuit Court.

26. On November 14, 2006, McNally signed an affidavit. In that affidavit, he stated that neither Thrower nor Anderson had been in possession of the Thrower Properties for more than ten consecutive years and that MSP had been in “exclusive ... adverse possession” of the property. That affidavit was filed with the Camden County Circuit Court.²

27. McNally’s statement in the affidavit was false because MSP did not have exclusive possession of the Thrower properties.

The Finke Affidavit

28. On August 11, 2002, McNally spoke to John Richardson about selling two lots (“the Finke Properties”).

29. The lots were owned by Arlene Finke. At that time, Finke was 98 and in a rest home. Richardson was Finke’s only son.

30. McNally wrote down that Richardson lived at 880 Bethel Road, Templeton, California 93465.

² Pet. Ex. S at 29.

31. On December 5, 2005, Coultas filed a quiet title action on behalf of MSP against Finke and her heirs in the Camden County Circuit Court.

32. On December 1, 2005, McNally signed an affidavit. In that affidavit, he stated that he believed that Finke had heirs but that he did not know the names or addresses of the heirs. That affidavit was filed with the Camden County Circuit Court.

33. McNally swore under oath that the contents of the affidavit were true.

34. McNally's statement that he did not know about Finke's heirs or their whereabouts was false because he had spoken to John Richardson, discovered that Richardson was Finke's only child, and know his address and telephone number.

Conclusions of Law

We have jurisdiction to hear the MREC's complaint.³ The MREC bears the burden of proving that McNally's license is subject to discipline by a preponderance of the evidence.⁴ A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not."⁵ The MREC has the burden of proving that McNally has committed an act for which the law allows discipline.⁶ The MREC alleges that there is cause to discipline McNally's license under § 339.100.2(2), (15), (16), and (19).

Section 339.100.2 states, in relevant part:

2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by the provisions of chapter 621 against any person or entity licensed under this chapter or any licensee who has failed to renew or has surrendered his or her individual or entity license for any one or any combination of the following acts:

³ Sections 339.100.2 and 621.045. Statutory references are to the 2012 supplement to the Missouri Revised Statutes unless otherwise noted.

⁴ *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012)

⁵ *Id.* at 230.

⁶ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App. E.D. 1989).

(2) Making substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the conduct of his or her business or pursuing a flagrant and continued course of misrepresentation through agents, salespersons, advertising or otherwise in any transaction;

(15) Violation of, or attempting to violate, directly or indirectly, or assisting or enabling any person to violate, any provision of sections 339.010 to 339.180 and sections 339.710 to 339.860;

(16) Committing any act which would otherwise be grounds for the commission to refuse to issue a license under section 339.040;

(19) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct or gross negligence[.]

Section 339.040.1 states:

1. Licenses shall be granted only to persons who present . . . satisfactory proof to the commission that they:

(1) Are persons of good moral character; and

(2) Bear a good reputation for honesty, integrity, and fair dealing; and

(3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.

In its amended complaint, the MREC based its case for discipline on the three affidavits that contained false information. For clarity, we will set out our findings regarding those affidavits here. We will then determine if there is a basis for discipline.

Credibility and McNally's False Statements in the Affidavits

We find that Sherry Anderson and Arlene Brown were credible witnesses. Anderson, Thrower's daughter, testified that Thrower had never abandoned the properties.⁷ Brown, Piatt's mother, testified that she lived with Piatt in Tennessee in January 2007, that Piatt lived in Tennessee until 2010, and that McNally called Piatt in Tennessee in January 2007.

After viewing McNally's testimony, we find him not to be credible. In a textbook impeachment, the MREC's attorney showed that McNally was grossly inaccurate in his description of where Piatt could be located, the existence of an heir for Finke, and Thrower's

⁷ Tr. 39.

ownership of the Thrower Properties. McNally's responses to questions at the hearing and through the pendency of the case show that he was not being truthful. McNally attributes his impeachment to his age. We reject that suggestion.⁸

We also find that McNally made false statements in three affidavits: one about the Piatt Properties, one about the Thrower Properties, and one about the Finke Properties. McNally signed each of those affidavits under oath. McNally stated in the Piatt affidavit and the Finke affidavit that the contents of each affidavit were true "according to his best knowledge and belief."⁹ Each of those affidavits was made as part of a quiet title action that MSP initiated in the Camden County Circuit Court.

The MREC alleged that McNally knew Piatt's correct address when he signed an affidavit stating that he could not locate Piatt. In the Piatt Properties affidavit, McNally stated that Piatt "cannot be served personally by ordinary process of law for the reason that [she is] ... unknown, and [her] name and whereabouts are unknown."¹⁰ In 2006, McNally hired a private investigator to determine Piatt's address. On July 11, 2006, the private investigator informed McNally that Piatt's current address was 3335 Stars Cove Lane, Knoxville, Tennessee 37931. McNally sent Piatt a letter on August 3, 2006, stating that his client had an interest in purchasing the Piatt Properties. McNally sent that letter to Piatt at 3335 Stars Cove Lane, Knoxville, Tennessee 37931. McNally knew about Piatt's correct address in Tennessee when he signed the affidavit. His statements to the contrary in the affidavit were false.

With regard to the Thrower affidavit, the MREC alleges that "[a]t the time [McNally] made the affidavit, he knew Thrower's telephone number and that Thrower resided at 859

⁸ McNally's suggestion that his age limited his ability to answer questions correctly calls his competence to hold his license into question. We cannot address that question because we are limited to the issues set out in the complaint.

⁹ Resp. Ex. R; Resp. Ex. T.

¹⁰ Resp. Ex. T at 8.

Cambridge, Saxton, MO 68301, or, in the alternative, [McNally] should have known Thrower's aforementioned telephone number and address."¹¹ The MREC also specifically took issue with McNally's statements in the affidavit that Thrower and/or Anderson had not been in possession of the Thrower Properties for more than ten consecutive years and that MSP had been in "exclusive ... adverse possession" of the property.¹²

The affidavit states, in full:

NOW COMES Pat McNally, and being first duly sworn, deposes and states:

1. He is at the age of majority and has knowledge of the matters stated herein.
2. He is the agent of Motor Sports Properties, L.L.C., a Missouri limited liability company, which is Plaintiff in the above-captioned matter.
3. Plaintiff claims title to certain real property located in Camden County, Missouri, more particularly described as:

All of Lots Two (2) and Three (3), Block Thirty-One (31) in Osage Beach Subdivision, according to the plat thereof on file and recorded in the office of the Recorder of Deeds, Camden County, Missouri;

in that plaintiff, its predecessors in interest and those under and through whom they claim, have been in actual, open, notorious, peaceable, uninterrupted, exclusive and undisputed adverse possession of said real property, under a claim of right, for more than ten consecutive years, during which time none of the Defendants nor any one of them or in their behalf have been in possession of said real property or any part thereof, or have claimed any recovery thereof.^[13]

This affidavit says nothing about Thrower's address or whether or not he could be found. The MREC has not produced any proof of the wrongdoing alleged in the complaint. Thus, the MREC's contention that there was a false statement about Thrower's address or where he could be found is unsupported by any evidence.

The MREC also alleged, however, that neither Thrower nor Anderson had not been in possession of the Thrower Properties for more than ten consecutive years and that MSP had been

¹¹ Amended Complaint at ¶34.

¹² Pet. Ex. S at 29.

¹³ Pet. Ex. S.

in “exclusive ... adverse possession” of the property. That statement is false. McNally sent letters to Thrower on September 20, 2002, January 9, 2003, and March 17, 2004, offering to buy the Thrower Properties. “[A] request [for permission to use the property of another] ... has been characterized as ‘important,’ ‘strong,’ ‘very powerful’ evidence tending to show that the prior possession was not adverse.”¹⁴ McNally’s actions in trying to purchase these properties for MSP demonstrate his knowledge that Thrower owned and possessed the properties. McNally’s claim that MSP had exclusive possession of the property is completely undercut by his attempts to buy the property from Thrower. His statements to the contrary in the affidavit were false.

In the Finke affidavit, signed on December 1, 2005, McNally stated that he believed that Finke had heirs, but that he did not know the names or addresses of the heirs. That statement is false. On August 11, 2002, McNally spoke to Richardson about selling the Finke Properties. The lots were owned by Finke. At that time, Finke was 98 and in a rest home. Richardson was Finke’s only son and lived at 880 Bethel Road, Templeton, California 93465. McNally wrote those details on stationary from his office and maintained that information in his files. His sworn statements to the contrary were false.

We therefore conclude that McNally made false statements in each of the three affidavits. We proceed to consider whether the MERC may discipline his license based on the false statements.

Laches and Timeliness

McNally contends that § 516.130(2)¹⁵ establishes a three-year statute of limitations and also that the doctrine of laches bars the MREC’s action.

¹⁴ *Charlton v. Crocker*, 665 S.W.2d 56, 63 (Mo. App. S.D. 1984), quoting *Bridle Trail Assoc. v. O’Shanick*, 290 S.W.2d 401, 407 (Mo. App. St.L.D. 1956)

¹⁵ RSMo 2000.

Section 516.130(2) establishes a three-year statute of limitations for actions “upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party or the state.” This statute, however, is not the only applicable part of Chapter 516. Section 516.100 states that “[c]ivil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued.” Chapter 516 is part of the “Civil Code of Missouri.”¹⁶ That code governs “the procedure ... in divisions of the circuit court in all suits and proceedings of a civil nature whether cognizable as cases at law or in equity.”¹⁷ This administrative action is not a civil action. Thus, § 516.130 does not apply to this case.¹⁸

Neither does laches. Laches is an equitable remedy.¹⁹ This Commission, as an administrative tribunal, may only apply the law as written and does not have jurisdiction to enforce or propound principles of equity.²⁰

Section 339.100.2(2)

Section 339.100.2(2) allows for discipline for the following actions:

Making substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the conduct of his or her business or pursuing a flagrant and continued course of misrepresentation through agents, salespersons, advertising or otherwise in any transaction.

We have already determined that each of the three affidavits contained false statements and therefore are misrepresentations. We must determine whether those false statements were substantial.

¹⁶ Section 506.010, RSMo 2000.

¹⁷ *Id.*

¹⁸ McNally does not allege that the MREC violated that statute of limitations for licensing cases found in § 324.043.

¹⁹ *UAW-CIO Local #31 Credit Union v. Royal Ins. Co.*, 594 S.W.2d 276, 281 (Mo. 1980)

²⁰ *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940)

“Substantial” is defined as “of or relating to the main part of something”²¹ The Piatt affidavit and the Finke affidavit were written in order to obtain service by publication. The affidavits contained the information required in Missouri Supreme Court Rule 54.12(c)(2) allowing for service by publication. McNally’s false statements that he did not know Piatt’s current address and that he did not know about Finke’s heirs were directly required by Rule 54.12(c)(2) in order to allow service by publication. The circuit court relied on the affidavits in granting service by publication, and service by publication led to a (ultimately set aside) default judgment in the Piatt case. McNally’s misrepresentations were related directly to service by publication. McNally’s false statements in the Piatt affidavit and the Finke affidavit were substantial.

The Thrower affidavit was written to show that MSP had a right to the Thrower properties under adverse possession. The statements in the affidavit regarding MSP’s exclusive possession of the property were false. The affidavit allowed for the entry of a default judgment granting MSP title to the Thrower properties based on adverse possession. The affidavit directly related to the main theory of the case. McNally’s false statements in the Thrower affidavit were substantial.

McNally also either concealed or omitted relevant facts that he had possession of: Piatt’s correct address, Thrower’s ownership of the properties, and Finke’s only heir and his address. McNally signed the affidavits in connection with his business; he was the buyer’s agent for MSP and was assisting them in obtaining the properties.

We find that there is cause for discipline under § 339.100.2(2).

²¹ Webster’s Third New Int’l Dictionary 2280 (unabr. 1986).

Section 339.100.2(15) and (16)

Section 339.100.2(15) states that there is cause for discipline when a licensee violates “any provision of sections 339.010 to 339.180.” The MREC’s amended complaint does not cite any provision of sections 339.010 to 339.180 that McNally allegedly violated. We find no cause for discipline under § 339.100.2(15).

The MREC properly asserts that McNally’s conduct is cause for discipline under § 339.100.2(16), which allows discipline for “committing any act which would otherwise be grounds for the commission to refuse to issue a license under section 339.040.” In the amended complaint, the MREC alleged that McNally lacks good moral character and a good reputation, which would be grounds for refusal of licensure under § 339.040.

Good moral character is honesty, fairness, and respect for the law and the rights of others.²² Reputation is the “consensus view of many people[.]”²³ Reputation is not a person’s actions; it is “the general opinion ... held of a person by those in the community in which such person resides[.]”²⁴

We find that McNally lacks good moral character. He submitted three sworn affidavits to the Camden County Circuit Court. Each of those affidavits contained critical factual errors. McNally’s pattern of submitting false affidavits demonstrates a lack of honesty and a lack of respect for the courts and the law.

The MREC did not present any reputation evidence. We therefore find that the MREC has failed in its burden of proof to show that McNally lacks a good reputation.

We find that McNally’s license is subject to discipline under § 339.100.2(16).

²² *Hernandez v. State Bd. of Regis’n for Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App. W.D. 1997).

²³ *Haynam v. Laclede Elec. Coop.*, 827 S.W.2d 200, 206 (Mo. 1992).

²⁴ *State v. Ruhr*, 533 S.W.2d 656, 659 (Mo. App. K.C.D. 1976) , *quoting* Black’s Law Dictionary 1467-68 (Rev. 4th ed.).

Section 339.100.2(19)

Section 339.100.2(19) states a license may be disciplined for “any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct or gross negligence.”

The adjective “other” means “not the same: DIFFERENT[.]”²⁵ Therefore, subdivision (19) refers to conduct *different than* the conduct referred to in the remaining subdivisions of the statute. We have found McNally’s false statements in the affidavits provide cause for discipline under § 339.100.2(2) and (16). If there is “other” conduct at issue, the MREC has failed to bring it to our attention in its post-hearing brief. We find no cause for discipline under § 339.100.2(19).

Summary

There is cause to discipline McNally’s license under § 339.100.2(2) and (16).

SO ORDERED on September 10, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner

²⁵ *Webster’s Third International Dictionary* 1598 (unabr. 1986).